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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1318

HELEN B. O'BANNON, Secretary of Public Welfare, Pennsylvania,

Petitioner,

-against-

TOWN COURT NURSING CENTER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF NEW YORK CITY, LEGAL SERVICES FOR THE ELDERLY POOR, COALITION OF INSTITUTIONALIZED AGED AND DISABLED, INC., AND FRIENDS AND RELATIVES OF INSTITUTIONALIZED AGED, INC.

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ON WRIT OF CERTIORARI TO THE UNITED
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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS, AND STATEMENT OF INTEREST OF THE AMICI.

The Legal Aid Society of New York City, Legal Services for the Elderly Poor, Coalition of Institutionalized Aged and Disabled, Inc., and Friends and Relatives of Institutionalized Aged, Inc., respectfully move this Court, pursuant to Rule 42 of the Rules of the Supreme Court, for permission to file the attached brief amicus curiae in support of respondents, by reason of the amici's substantial interest in and ability to contribute to the outcome of this case and their considerable experience in the subject-matter and in the constitutional and evidentiary issues involved here.

1. Movant The Legal Aid Society is a private non-profit organization incorporated under the laws of the State of New York for the purpose of rendering legal representation and assistance without cost to persons in New York City who are without adequate

means to employ other counsel. The client population of the Civil Division of The Legal Aid Society includes substantial numbers of indigent persons who are recipients of benefits under the Medicaid Program and are residents in nursing facilities.

2. Movant Legal Services for the Elderly Poor is funded by the Legal Services Corporation through Community Action for Legal Services, Inc. of New York City to provide assistance on research and litigation to lawyers dealing with the problems of the elderly. It is concerned with the legal rights of indigent elderly in nursing homes receiving Medicaid benefits and has represented such persons in numerous actions concerning matters affected by this action. See, e.g. Point II. c. infra.

3. Movant Coalition of Institutionalized Aged and Disabled, Inc. is composed of 15,000 institutionalized residents of

more than 50 long term care facilities in New York State. The Coalition is engaged in advocacy on behalf of the institutionalized elderly concerning issues which affect their welfare, dignity and quality of life. The rights of the members of the Coalition will be directly affected by the issues addressed in this case.

4. Movant Friends and Relatives of Institutionalized Aged, Inc. (F.R.I.A.) is a consumer organization of families and friends of residents of long term care facilities in New York City. F.R.I.A. has more than 1,000 members who monitor the care provided in New York City's 216 long term care facilities and advocate on their behalf.

5. Attorneys from The Legal Aid Society and Legal Services for the Elderly Poor represent a plaintiff class in federal court composed of all Medicaid-eligible residents of nursing facilities in New York

State challenging the State's procedures for transferring them for ostensible medical reasons. Yaretsky v. Blum, 76 Civ. 3360 (S.D.N.Y.) Movants have derived from the representation in Yaretsky considerable knowledge and experience concerning the constitutional questions presented here, though in a different context, and concerning the "transfer trauma" suffered by patients who are involuntarily displaced from their facilities.

6. Also, movants present a position in this case which is not taken by the parties hereto and to which this Court should give consideration, namely, that in light of certain developments and facts the writ of certiorari in this case should be dismissed as improvidently granted or the judgment below vacated and the case remanded for further proceedings.

7. Movants have an obvious and immediate interest in the issue before this

Court in this case. This motion has been filed because counsel for movants have been unable to obtain consent to the filing of this brief from counsel for the Secretary of Health, Education and Welfare, who is purportedly a party in this case in this Court.

WHEREFORE, movants pray that the attached brief amicus curiae be permitted to be filed with the Court.

Dated: New York, New York
August 10, 1979

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF NEW YORK CITY, LEGAL SERVICES FOR THE ELDERLY POOR, COALITION OF INSTITUTIONALIZED AGED AND DISABLED, INC., AND FRIENDS AND RELATIVES OF INSTITUTIONALIZED AGED, INC., IN SUPPORT OF RESPONDENTS.

STATEMENT OF CASE

This suit was instituted in the United States District Court for the Eastern District of Pennsylvania during the pendency of administrative proceedings before the Department of Health, Education and Welfare ("HEW") by the nursing facility Town Court contesting HEW's decision to terminate its participation in the Medicare program, which decision in turn required the Pennsylvania Department of Public Welfare to terminate the facility's participation in the Medicaid program as well. In the complaint in this suit Town Court asserted claims against the Secretary of HEW and the Secretary of the Pennsylvania Department of Public Welfare that due process requires that their agencies afford it an evidentiary hearing prior to the termination of its participation in the Medicare and Medicaid programs. In the same complaint six Medicaid-eligible

patients in the Town Court facility asserted against the Secretary of the Pennsylvania Department of Public Welfare the claim that due process guaranteed them the right to be heard on the issue of the termination of Town Court's participation in the Medicaid Program. The proceedings in the District Court eventuated in a judgment dissolving a preliminary injunction entered earlier against the defendants and prohibiting defendants from withholding payments to Town Court for services actually provided to patients. Town Court and the patients filed separate appeals from the District Court's dissolution of the preliminary injunction and the Secretary of HEW appealed from the portion of the judgment adverse to him. The state defendant did not take an appeal and appeared as an appellee in the Third Circuit Court of Appeals.

The Third Circuit, sitting en banc, issued two separate decisions, one deciding Town Court's constitutional claims and the other determining the patients' constitutional claims. With respect to Town Court's claims, the court held that the facility was not constitutionally entitled to a pretermination evidentiary hearing. 586 F. 2d 266. Regarding the patients' claims, the court ruled that the patients had a due process-protected property interest and the right to some opportunity to be heard in connection with the decision to terminate the facility. 586 F. 2d 280 (3d Cir. 1978).

The petitioner Secretary of the Pennsylvania Department of Public Welfare sought, and this Court has granted, a writ of certiorari in this case to review the correctness of the Third Circuit's decision that the respondent patients have a right under

the Fourteenth Amendment's Due Process Clause to participate in the governmental determination to decertify the provider Town Court. By this amicus curiae brief submitted in support of the respondents, The Legal Aid Society of New York City, Legal Services for the Elderly Poor, Coalition of Institutionalized Aged and Disabled, and Friends and Relatives of Institutionalized Aged, set forth their arguments, first, as to why this Court should now dismiss the writ of certiorari as improvidently granted or vacate the judgment and remand the case for further proceedings, and, second, as to why the Court, if it does decide the question presented, should affirm the judgment of the Third Circuit.

SUMMARY OF ARGUMENT

Amici urge that, in light of facts and circumstances of which this Court was not

made aware when certiorari was granted, this Court should now dismiss the writ of certiorari in this case as improvidently granted. Alternatively, this Court should vacate the judgment below and remand the case with directions that it be reconsidered in light of available non-constitutional grounds for decision represented by imminent HEW rulemaking and applicable Pennsylvania state law.

Should the Court decide the constitutional question on which certiorari was granted, it should decide that due process attaches for nursing home patients when the government determines that Medicaid payments to the facility where they reside and receive care should be terminated. Whereas the patients are helpless and dependent on the facility as their only home, the result of the governmental decision will be to deprive them of necessary care or, at best, to expose them to death and serious injury

resulting from transfer. The loss of life and/or physical harm that the patients will suffer, the eviction from their homes and the rupture of their most basic interpersonal relationships, implicate constitutionally protected interests in "life" and "liberty". In addition, nursing home patients have a legitimate "property" or statutorily derived "liberty" interest in being heard which derives from the fact that they were residing in a certified facility and that they are entitled by statute, regulation and policy to continued residence and assistance absent proof of specific conditions, including determination of the patients' overall best interests.

Further, patients are plainly able to provide meaningful and important input into the question of facility termination.

ARGUMENT

POINT I.

THE WRIT OF CERTIORARI IN THIS CASE SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED OR, ALTERNATIVELY, THE JUDGMENT BELOW SHOULD BE VACATED AND THE CASE REMANDED FOR RECONSIDERATION IN LIGHT OF NEWLY-DISCLOSED DEVELOPMENTS.

A. Introduction

This Court has granted certiorari in this case to decide the question of whether nursing facility residents who are eligible for benefits under the federal Medicaid Program, 42 U.S.C. §1396 et seq., have a constitutional due process right to notice and an opportunity for some kind of hearing before the government may decide that the nursing facility is unqualified to participate in that program. Amici respectfully urge that, in light of certain circumstances and developments of which the Court was not made aware when certiorari was granted, this Court should

now dismiss the writ of certiorari in this case as improvidently granted. In the alternative, the judgment below should be vacated and the case remanded to the Third Circuit with directions that the case be reconsidered in light of available non-constitutional grounds for decision, including the application of imminent rule-making of the Secretary of Health, Education and Welfare ("HEW") and relevant Pennsylvania state law which will dispose of the controversy or will eliminate or substantially modify the constitutional question presented here.

The reasons why the writ of certiorari should now be dismissed, or the judgment below vacated and the case remanded, flow from an analysis of the nature of the claims in this case and the posture and positions of the parties at various levels of this litigation. That analysis leads ineluctably to the conclusion that the

instant case presents a wholly inappropriate vehicle for this Court's resolution of the constitutional question on which certiorari was granted.

In summary, the several conclusions produced by the analysis undertaken in this brief are as follows: (1) The petitioner Secretary of the Pennsylvania Department of Public Welfare ("state agency") is a mere stakeholder in this litigation who, under applicable federal law, exercises no independent authority in the governmental determinations to terminate the provider from the Medicaid program once HEW terminates the provider from the Medicare program. While petitioner may have an obligation flowing from Pennsylvania state law to provide notice and opportunity for hearing to patients in connection with the facility termination process, that state law was neither pleaded nor developed in the record in this case. Further,

petitioner lacks standing in this court to argue the question presented on certiorari here concerning the patient notice and hearing rights in the facility termination process. (2) The Secretary of Health, Education and Welfare, under the circumstances here, might have been the appropriate party to provide the patients with notice and opportunity for a hearing. However, although he filed a brief in this court and in the Third Circuit addressed to that claim, the Secretary of HEW was not even sued by the respondent patients in this case, and he declined to seek certiorari review of the Third Circuit's adverse judgment in the companion case, Klein v. Califano, 586 F. 2d 250 (3d Cir. 1978), in which he was the party defendant. Finally, HEW plans, in the near future to institute rulemaking in the precise area which is the subject of this litigation which will likely end the controversy or avoid or substan-

tially modify the constitutional question presented. (3) The claims of the respondent patients in this case were pleaded by the provider Town Court's attorneys, and only subsequently was a lawyer "retained" -- by Town Court's attorneys -- to represent the patients. Further, Town Court's attorneys appear to have been the primary actors in prosecuting this case, up to and including the proceedings in this Court. Thus, there exist serious questions as to whether the respondent patients have the benefit of an independent and aggressive advocate for their interests.

Amici respectfully submit that when this case and the issue presented are put into proper focus, as summarized above and more fully explained below, it becomes apparent that the case assumes an isolated and fragmented significance that was not apparent when the writ of certiorari was granted, and that there no longer exist

"special and important reasons," under Supreme Court Rule 19(1), for retaining certiorari in this case.

B. Roles of HEW and Petitioner State Agency in the Facility Termination Process.

An elaboration of the points summarized above necessarily begins with an examination of the respective roles played, under federal law, by HEW and the petitioner state agency in the decision-making process resulting in the termination of a nursing facility from the Medicare and Medicaid programs.

A provider such as Town Court which participates in both the Medicare and Medicaid programs must be certified as qualified for both programs by HEW. (HEW brief, at p. 4 n.9). When HEW terminates a Medicare provider agreement, on the basis of either state or HEW surveys, the participating state is required by applicable

HEW regulations to automatically terminate the Medicaid provider agreement. (HEW brief, at p. 5; 586 F. 2d at 270). In this case HEW, acting upon the recommendation of the Pennsylvania Department of Health, (not the petitioner Department of Public Welfare) notified Town Court of its determination to terminate the facility's participation in the Medicare program. As required by federal law, the petitioner state agency thereupon notified Town Court that because of HEW's determination Town Court must be terminated from participation in the Medicaid program. (HEW brief, at pp. 8-9; 586 F. 2d at 272). Thus, under federal law the petitioner state agency neither participated in the survey of facility conditions nor exercised independent judgment in the facility termination decision.[1]

fn. 1 next page

The absence of a discretionary role by the petitioner in the circumstances here is reflected as well in the positions adopted by the petitioner and HEW in the Third Circuit in this case. There, petitioner conceded that he "participates neither in the decision-making of the survey agency nor in the decision-making of the federal agency," and accordingly he expressly declined to take a position in that court on the legal or factual issues raised by the appeal. Petitioner stated that his "role is basically that of a stakeholder and his position should not be inferred to be either for or against the position of either the federal agency or the nursing facility." (HEW brief, at p. 20). Petitioner adopted this posture

1. However, as more fully discussed later in this brief, the petitioner may have obligations arising under Pennsylvania state law, neither pleaded nor developed in the record in this case, to play an independent role in the facility termination decision.

because of his appreciation of the fact that "he was required to terminate Town Court's Medicaid agreement upon Secretary Califano's termination of Town Court's Medicare provider status." (586 F. 2d at 279). Equally, it was the position of HEW in the Third Circuit that the only real controversy that could exist concerning the due process rights of the facility and its patients was with the federal agency, and not with petitioner. (586 F. 2d at 279).

C. The Instant Case: Claims, Parties and History.

After receiving notification from the petitioner that its participation in the Medicaid program must be terminated because of HEW's decision to terminate its participation in the Medicare program, Town Court commenced administrative review proceedings before HEW. But before these proceedings were concluded, Town Court filed this suit

in federal court; included in the complaint were claims on behalf of six named Town Court patients. (HEW brief, at p. 9; 586 F. 2d at 272). The patients' claims, however, were asserted only against the petitioner state agency; none were asserted against HEW.[2] See 586 F. 2d at 272 n. 5. Further, it is conceded that the petitioner did not appeal to the Third Circuit from the portion of the District Court judgment adverse to it in this case. (HEW brief, at pp. 17-18). Since HEW, the purported appellant in the Third Circuit, was not sued as a defendant in this case, and since the petitioner state agency did not appeal from the District Court judgment, there

2. The verified complaint contains claims by the provider Town Court against both the petitioner state agency and HEW. However, Town Court did not seek certiorari review of the judgment adverse to it in the Third Circuit (586 F. 2d 266) and is not a party to the instant case before this Court.

exists a serious question as to whether a determination of the appeal in the Third Circuit was proper.

Another consequence of the failure of the petitioner to take an appeal to the Third Circuit is that, in the opinion of amici, the petitioner does not have standing to ask this Court to review the constitutional question presented on certiorari. Further, in taking the position in the Third Circuit of a mere "stakeholder" without an interest in opposing the patients' constitutional claims, petitioner failed to properly reserve its arguments on that constitutional question. Although it draws back from resolving these admittedly "close" questions against petitioner, HEW convincingly sets forth in its brief to this Court (pp. 17-21) the arguments why petitioner is thereby disqualified from asserting in this Court the

constitutional question on which certiorari has been granted. No more need be added to those arguments and to the similar arguments asserted by respondent patients in their brief to conclude that the constitutional question is in fact not properly presented to this Court for review.

In view of the petitioner's incapacity to press review of the Third Circuit judgment, the posture of this case in this Court reduces to an effort by HEW -- which was not a party defendant to the respondent patients' claims, did not seek certiorari review in Klein v. Califano, supra, and now proposes administrative rulemaking to satisfy the patients' due process claims -- to secure from this Court a purely advisory opinion. Under these circumstances the constitutional question on which certiorari was granted is not now suitable for a decision by this Court on the merits.

A careful examination of the record also

raises serious questions concerning the independence and effectiveness of the representation of the respondent patients, and, indeed, concerning their capacity to sue in this case. When the case was initiated, the claims of patients were added to the complaint filed by the nursing home and "representation" was provided by the nursing home's attorneys (7a-13a). Amici have been advised that HEW raised a question about this lack of representation at an off-the-record hearing on the application for a temporary restraining order. The record indicates that to circumvent the problem, the nursing home's attorneys sought out and retained (and agreed to pay) another attorney who filed an appearance on behalf of the patients (192a-193a). The record is bereft of evidence, however, that this attorney provided any meaningful participation in the District Court, and he did not parti-

cipate in the Court of Appeals argument. It has further come to the attention of amici that the papers submitted to this Court on behalf of the respondent patients are substantially, if not entirely, prepared by attorneys for Town Court.

The inference suggested by this is that the patients' "participation" here has been used as a vehicle for the nursing home's interests, notwithstanding that it is obvious that the interests of a nursing home and of nursing home patients do not necessarily coincide. It is entirely possible that a nursing home would wish to retain its Medicaid patients but the patients would wish to relocate to a better facility or to return home. Conversely, Medicaid patients may have more interest in remaining in a facility than the facility does in retaining them (since, for example, the Medicaid rate paid for the bed is less than the facility could

obtain from private-paying patients on its waiting list). Or both the patients and the home may be interested in continued certification of the facility, but the patients' interests may be in having mandated improvements or in having the present operator replaced by a court-appointed receiver.

The nature of the patients' representation and potential conflict of interests raise serious question as to whether the patients' interests were effectively asserted from the beginning of the litigation, whether the interests asserted are indeed those of the patients, and even whether the patients' true interests have ever been assessed.[3]

3. For all that is shown in this record concerning the disabilities and dependency of the respondent patients, there may even be a question concerning the capacity of the patients to sue with their present representation. Under Rule 17(c) of the

(fn. 3 continued on next page)

The lack of independent patient representation could explain why the patients' claims were not properly presented at the outset -- why, for example, HEW was not sued in the patients' portion of the complaint. Another serious consequence of the lack of effective independent representation of the patients in this case is the absence in the record below of any development of the substantial state law grounds, advanced for the first time by patients'

(fn. 3 continued)

Federal Rules of Civil Procedure, infants and incompetent persons may only maintain an action in the federal courts through duly appointed representative, next friend or guardian ad litem. Under Rule 17(c), the court must "appoint a guardian ad litem ...or shall make such other order as it deems proper for the protection of the infant or incompetent person." Representation by counsel is not necessarily adequate protection under Rule 17(c), nor does the attorney automatically become the guardian ad litem. Zaro v. Strauss, 167 F. 2d 218, 220 (5th Cir. 1948); M.S. v. Wermers, 557 F. 2d 170 (8th Cir. 1977). In this case no guardian ad litem was appointed and, while the record reflects the nature of the representation, it does not appear that any inquiry was made or order entered to guarantee protection of the interests of the patients.

counsel in their brief in this Court, for disposing of this case or of substantial evidence of patient transfer trauma, the severe physiological and psychological injury which the patient who is involuntarily displaced from his facility is likely to suffer.[4] These glaring and serious deficiencies in the record in this case go to the heart of whether the constituional question on which certiorari was granted is presented with sufficient clarity and focus to warrant a decision by this Court on the merits. Cf. Belcher v. Stengel, 429 U.S. 118 (1976); Kimbrough v. United States, 364 U.S. 661 (1961); Mitchell v. Oregon Frozen Foods Co., 361 U.S. 231 (1960).

4. The available state law grounds for disposing of this case and the issue of transfer trauma are more fully discussed later in this brief.

D. Available Non-Constitutional Grounds For Decision in this Case.

1. HEW Rulemaking

The rulemaking which HEW, in its brief to this Court, announces it intends to institute "in the near future" for the purpose of "enhancing patient participation in the survey and termination process" (HEW brief, pp. 17, 37) may end the controversy here (if there remains one at all) and will, at the least, modify or eliminate the constitutional question presented here. Since the applicable law bearing on the precise procedural questions upon which certiorari was granted in this case is, by HEW's admission, undergoing "substantial revision", it would be a "particularly inopportune time" for this Court to consider a constitutional challenge to the procedures. Cf. Murel v. Baltimore City Criminal Court, 407 U.S. 355, 358 (1972). It would seem

that the "appropriate course is to withhold judicial action pending reprocessing, under the new regulations, of the determinations here in dispute." Richardson v. Wright, 405 U.S. 208, 209 (1972). "In the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise." Richardson, supra, 405 U.S. at 209.

If the revised administrative process provides substantially enhanced procedural safeguards for the patients, or results in an administrative determination satisfactory to the patients, there will be no need to consider the constitutional questions presented by this case. Dismissing the writ of certiorari as improvidently granted, or remanding the case to the Third Circuit for reconsideration in light of the contemplated HEW rulemaking, is

thus consistent with this Court's "usual practice of avoiding decisions on constitutional matters if a case may be resolved on other grounds." Youakim v. Miller, 425 U.S. 231, 236 (1976). Cf. Kremens v. Bartley, 431 U.S. 119, 128 (1977); Fusari v. Steinberg, 419 U.S. 379 (1976); Thorpe v. Housing Authority, 386 U.S. 670 (1967). It should not suffice as a justification for a determination of this case on the merits that HEW might like to receive from this Court an advisory opinion on a constitutional issue which it intends to independently address by imminent administrative rulemaking. (HEW brief, pp. 40-41). As this Court has observed, in the "exercise of judicial restraint from unnecessary decision of constitutional issues," the Court "cannot be bound by the wishes of the parties." Kremens v. Bartley, supra, 431 U.S. at 134 n. 15, 136. See also Layne & Bowler

Corp. v. Western Well Works, 261 U.S. 388, 393 (1923).

2. State Law Grounds

Although the pleadings, briefs, and record in the lower courts fail to present the issue, it is clear that applicable Pennsylvania state law may be the source of patient property interests in the facility termination process which are protected by due process and, indeed, may independently secure for the patients the procedural safeguards which they seek in this case.

In their brief to this Court, patients' counsel set forth for the first time provisions of Pennsylvania state law which give the patients due process protected property interests in the opportunity to be heard in connection with a facility termination decision. There are additional provisions of Pennsylvania law which by their own terms appear to provide hearings for patients in connection with

a facility termination decision which has the inevitable effect of involuntarily displacing the resident patients from that facility in order to continue their Medicaid payments. The regulations of the petitioner Pennsylvania Department of Public Welfare governing hearings for recipients of public assistance guarantees a hearing to a recipient who has experienced a "denial, discontinuance, reduction, or exclusion from a Departmental service program including the failure to take into account the client's choice of a service or a determination that he must participate in a service program" or a change in the "manner or form of payments." 55 Pennsylvania Code, Chapter 275, section 275.1(a)(4)(i)(C) and (D). Under these regulations it would seem that the respondent patients, who must be transferred to another facility in order to remain eligible for Medicaid payments for nursing services

rendered to them, have a state law right to be heard on the question of whether the facility in which they are presently resident should be decertified. These state hearing regulations go much farther in this regard than the federal hearing regulations at 45 CFR §205.10(a), discussed by the Third Circuit. 586 F. 2d at 257, 286. To the extent that the scope and applicability of these regulations are unclear, and the resolution of their meaning by the Pennsylvania state courts might avoid or significantly modify the federal constitutional question presented here, then federal court abstention under Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) might be indicated. Cf. Carey v. Sugar, 425 U.S. 73 (1976). In any event, the existence of these possible adequate non-federal grounds for decision in this case, which were not raised and developed below, seriously undermines the importance

and clarity of the federal question presented here and militates against its decision by this Court.

E. Conclusion

Even if the considerations and developments discussed above do not necessarily render this case moot, or remove the element of case or controversy, or entirely dispose of the patients' claims, they unquestionably cast the claims "in a different light, not contemplated by...[the] original grant of the writ." Murel v. Baltimore City Criminal Court, 407 U.S. 355, 357 n.3 (1972). Amici respectfully suggest that the totality of circumstances disclosed since the writ of certiorari was granted make this case an inappropriate vehicle for decision of the constitutional question presented here. Jones v. State Board of Education, 397 U.S. 31, 32 (1970). Accordingly, the writ of certiorari should

be dismissed as improvidently granted. In the alternative, the judgment below should be vacated and the case remanded to the Third Circuit for reconsideration in light of the imminent HEW rulemaking and relevant Pennsylvania state law.[5]

POINT II.

SHOULD IT REACH THE CONSTITUTIONAL ISSUE ON WHICH CERTIORARI WAS GRANTED, THIS COURT SHOULD RESOLVE THE ISSUE IN FAVOR OF THE RESPONDENT PATIENTS.

As indicated above, amici do not believe that this Court should issue the advisory opinion sought here by HEW concerning the due process rights of patients to notice and an opportunity to be heard before the federal agency in connection with a facility termination decision.

5. As suggested above, the remand might include a direction that Pullman abstention be considered in light of the available, and perhaps unclear, state law grounds for decision here.

However, should the Court address that question, amici contend that it should be resolved in favor of the patients.[6]

A. The Nature and Context of the Governmental Action.

Assessing the due process implications requires examination of the "nature of the interest at stake," Board of Regents v. Roth, 408 U.S. 564, 571 (1972), which in turn requires analysis of the nature of the governmental action and the context in which it occurs. Assuming their similarity to nursing home patients generally, the Town Court patients are among the most helpless, frail and dependent persons in our society. A majority of nursing home patients, on average, are

6. Amici agree with the petitioner (Pet. brief p. 9) and with the Secretary of HEW (HEW brief pp. 22, 41-42) that the issue, in any event, is only the threshold question of whether due process attaches, not what process is due, which was reserved by the Third Circuit for determination upon remand to the District Court. 586 F. 2d 283.

over 80 years old, are mentally impaired, cannot walk, and have four or more chronic or crippling disabilities. U.S. Senate Subcommittee on Long Term Care, Nursing Home Care in the United States: Failure in Public Policy - Introductory Report, (November, 1974) pp. 16-17. In addition, they are largely alone -- almost half "have no viable relationship with a close relative" -- and have resided at the home for two years or more. Id. The four walls of their rooms and corridors, their fellow patients, and the facility staff substantially circumscribe their entire universe and the totality of their human contacts. For better or worse, the nursing home is the only home they have. In part this is because the lack of viable non-institutional options is likely responsible for their being in a nursing home to begin with, and in part it is because a house, and the funds with which to pay for upkeep or rent, is an available resource and

available income under the Medicaid program which must be paid to the facility. See generally, 42 CFR Part 435.

Under Medicaid regulations, the funds for the care that these patients receive in the home where they reside will be terminated no more than 30 days following the "decertification". 42 CFR §449.10(d)(3)(ii); HEW Br. p. 5, n. 13. After that, the patients will be deprived of life-sustaining care [7] or remain without payment. However, the presumption on the part of the Third Circuit and on the parts of petitioner and the Secretary of HEW, that the patients will be transferred and will not suffer interruption of their care, is not warranted. The record contains no such reassurances that their needs will be met elsewhere and the patients are without

7. Non-payment is grounds for discharge from a facility. 42 CFR 405.1121(k)(4).

the means to fend for themselves. Moreover, there is a severe shortage of nursing home beds, especially for Medicaid patients, in the area [8] (See pp. 263a, 266a) and the trial judge found it necessary to direct the government to arrange alternate care (130a).

In addition to deprivation of care and treatment, relocating these patients to other facilities is itself a source of death and serious injury. There is little development in the record below regarding "transfer trauma" (16a, 17a, 253a), although much could have been said. The briefs of the other amici and the respondent patients discuss the large quantity of geriatric literature, reporting such dramatic findings as mortality rate increases of 100% or more, and the

8. This is presently the subject of patient-initiated litigation against the State (DeGregorio v. Beal, Civil No. 75-2033 (E.D. Pa)), asserting failure to make more beds available, and against the nursing home industry -- Town Court included -- (DeGregorio v. Segal, Civil No. 76-264 (E.D. Pa.)) asserting anti-trust conspiracy to boycott Medicaid patients.

repeated findings of trial courts concerning the effects of transfer trauma.

As indicated earlier in the statement of interest of the amici, attorneys from The Legal Aid Society of New York City and Legal Services for the Elderly Poor represent in Yaretsky v. Blum, 76 Civ. 3360 (S.D.N.Y.), a plaintiff class composed of all Medicaid eligible residents of nursing facilities in New York State. Yaretsky presents a comprehensive challenge to the procedural and substantive validity of the process administered in New York State for determining that patients should be transferred from their facilities, ostensibly on the basis of medical decisions that they no longer need their current level of care. The District Court certified the plaintiff class and issued a preliminary injunction which, insofar as appealed from, was affirmed by the Second Circuit Court of

Appeals. 592 F. 2d 65 (1979). See also 456 F. Supp. 653 (1978).[9]

In preparing for trial of the Yaretsky case, respected experts determined that the characteristics of nursing home patients - infirm, frail, confused, dependent - are the very characteristics associated with the highest risks of mortality and morbidity from transfer trauma, and that another major factor is the voluntariness of the transfer. Moreover, research conducted in connection with the Yaretsky case found that for patients slated for transfer because their conditions had improved, who did not want

9. It should be noted that the issue presented in the instant case concerning the due process right of a nursing home patient to notice and hearing in connection with a facility decertification decision is distinct from the due process issue in Yaretsky of the right of a facility patient to adequate notice and an opportunity to rebut the agency determination that the individual patient no longer requires the level of care currently being provided and should be transferred to another facility.

to transfer, even the decision to transfer them had a major effect: more than 20% died or were hospitalized before transfer could be arranged and 25% deteriorated to the point that the decision had to be reversed. Yaretsky v. Blum, supra, Plaintiffs' Exhibit 35; Psychology Today, Vol. 13, No. 5, (October 1979).[10]

It is not that "transfer trauma" reduces the "value" of the patients' benefits. Klein v. Califano, 586 F.2d 250, 259 n.16 (3rd Cir. 1978). It is simply, as a more developed record would have shown, that if the Town Court situation is typical, some patients will die and others will suffer serious injury,

10. The New York State officials who were the defendants in the Yaretsky case did not dispute these findings and, in accordance with them, proposed program modifications which formed the basis for a settlement of the action.

or at best, there is a grave risk that this will occur.[11] This result is a necessary, not an incidental, consequence of decertification.[12]

11. This is not to suggest that a facility may not, therefore, be decertified. Evaluating these competing risks is the point of a hearing.

12. The petitioner states that Pennsylvania "does not intend to minimize (the) seriousness" of these consequences, but relies on its "program" to negate the injury (Pet. Brief, p.22 and n.21). However, there is nothing in the record about what this program entails, whether and how it will be applied, or its efficacy. Moreover, while a particular plan may of course be beneficial in a case where there is no alternative to transfer, no one, including Dr. Leon Pastalan of the University of Michigan Institute of Gerontology and author of the Pennsylvania plan, has suggested that it necessarily reduces the risk to acceptable levels or neutralizes "trauma" as a factor to consider.

B. Nature of the Due Process Interests which Flow from the Governmental Action.

Close analysis of the nature of the governmental action involved makes it possible to identify the bases for a number of interests protected by procedural due process, although it may not always be possible, or necessary, to precisely identify one or another interest as falling into the category of "liberty" rather than of "property" or "life".

1. The Patients' "Life" and "Liberty" Interests.

While the attention of the courts below, of the parties, and of HEW has focused on statutory sources of a property interest, the most serious consequences flowing from the governmental action are that it threatens the very lives of the patients in addition to uprooting and evicting them from their homes. Of all the interests protected by the Constitution,

none can be more important than life itself. Yet, as discussed above, deprivation of life may well be a necessary consequence of the governmental action. If, for example, it were established that as a result of "decertification" the life of a cancer patient would be shortened by three months, that a life sustaining treatment would be interrupted, or that a group of frail patients would succumb to the stress of transfer, could one contend that the life interests of these persons were not entitled to be heard? Short of determinable loss of life, freedom from serious bodily injury is a constitutionally protected interest. Screws v. United States 325 U.S. 91(1945); Williams v. United States 341 U.S.97(1951); United States v. Guest 383 U.S. 745(1966). It protects even persons whose other liberty interests have been legitimately

infringed. Haines v. Kerner, 404 U.S. 519 (1972).

Second, unlike the interests of a recipient in other medical services or even in certification of an acute care hospital, a nursing home is only partially a medical facility; it is the patients' home. As Circuit Judge Adams correctly observed:

> Many of them have been uprooted from the communities in which they spent their working lives. For most of these patients, the limited world of the nursing home is the only community in which they retain a stable network of personal and social relationships.

586 F.2d at 289. Nursing home patients are not like prisoners, whose right to protest arbitrary transfer was curtailed when they were convicted, Meachum v. Fano, 427 U.S. 215 (1976). Cf. Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 47 USLW 4581 (May 29, 1979);

Baker v. McCollen, 47 USLW 4834 (June 26, 1979. Rather, they surrendered no liberty rights upon entering the institution and, because they are so helpless, their interests in making their homes and enjoying basic human relationships in relative peace and without arbitrary infringement are perhaps deserving of even greater consideration. Cf. Shapiro v. Thompson, 394 U.S. 618, 629 (1969) ("resettle... and start a new life"); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) Meyer v. Nebraska, 262 U.S. 390 (1923); Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 10, n.10 (1978); Lopez v. Henry Phipps Plaza South,Inc., 498 F.2d 937 (2d Cir. 1979); Joy v. Daniels,479 F.2d 1236 (4th Cir. 1973).

2. The Patients' "Property" Interests.

The nursing home patients have a legitimate expectation of being heard[13]

13. Either a "property" interest or statutorily derived "liberty" interest. Meachum v. Fano, supra, 427 U.S. at 226.

on the question of whether payments to the nursing home where they live and receive care should be terminated, which derives from the fact that the home where they presently reside is certified by the state and federal authorities (and continuously licensed by the state), and that they are entitled to continued residence and receipt of assistance absent proof of specific conditions, among them that termination is in their best interests. Goldberg v. Kelly, 397 U.S. 254 (1970); Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); Memphis Light, Gas and Water Division v. Craft, supra; Greeholtz v. Nebraska Penal Inmates, supra.

Reduced to its essential elements, it is apparent that the governmental action - "decertification" - is a decision to cut off Medicaid assistance for the care that these patients are receiving at Town Court

and is a termination of welfare benefits under Goldberg v. Kelly, supra. As with any assistance program, the relationship between petitioner and the respondent patients is based on receipt of benefits, except that, for administrative purposes, the actual payments are made directly to providers of medical care. 42 CFR §447.10. The suggestion that respondents will not lose benefits when payments for their care to the facility are stopped, because they will be transferred to other homes, is disingenuous. This is not only because no transfer may be possible and they may indeed be left without care or payments, but also because if the outcome is continuation of benefits elsewhere, the patients are likely to be forced by helplessness and dependency to accept a substitute facility not of their own choice. This does not change the nature of the action. Petitioner is no more than

a paying agency insofar as the patients are concerned - the patients were not "committed" to the home and are not subject to "transfer" at petitioner's direction - and the action is no more than a termination of benefits.[14]

The patients have been receiving benefits from the certified skilled nursing home of their choice, continued receipt of which is guaranteed by statute, regulations and policies, absent a finding of specific provable facts. 42 U.S.C. §1396a (a)(23); Memphis Light, Gas and Water Division v. Craft supra, 436 U.S. at p.9-12; Goldberg v. Kelly supra. The question is not, as petitioner and HEW would suggest,

14. The argument that this rationale would apply to all constrictions of services under the program goes to the scope of any due process protection, rather than the nature of the interest, which obviously does not always require formal, individualized procedures. See discussion at Point III, infra; Dodson v. Parham, 427 F.Supp. 97 (1977) (individualized notice not required of changes in Medicaid drug list).

simply whether the facility violated or did not violate certain standards, but rather concerns the overall question of continued payments to the nursing home, of which the purported violations make up only one of several factors. Decertification for violation of standards is a matter of circumscribed discretion, (42 CFR §442.105, HEW brief p.5) which is exercised only rarely; witness the resolution of previous findings of violation by Town Court (HEW brief pp. 6-8) and the fact that, as the respondent patients' brief reports, of the more than 10,000 Medicaid nursing homes, only 40-50 facilities are decertified in a normal year.

In addition to such administrative criteria as prior history, seriousness of the offense and prognosis for improvement, consideration of "patient-centered" criteria is not only an entitlement grounded in established policy and practice,

Perry v. Sinderman, supra, 408 U.S. at 603 (1972),but as discussed below, is legally mandated. Among the considerations that, perforce, go into the broader inquiry to determine final disposition, are the alternative sources of care available, the alternative remedies available,[15] and the comparative effect on the patients. No one could suggest that whether the patients overall interests are better served in the facility, with its deficiencies, or elsewhere,is not a, or perhaps the,critical question for the decision maker,[16] else enforcement

15, e.g. submitting a plan of correction (42 CFR §442.105), conditional certification (42 CFR §442.111), receivership (see fn.17 infra).

16. Although amici are not close enough to the situation to express an opinion, amici note that the Trial Court concluded:

(fn. 16 continued on next page)

of standards be little more than a bureacratic exercise for its own sake. Nor could anyone suggest that the outcome will invariably be the same, for example, regardless of whether the patients depend on the facility for unique or specialized services, or whether the facility is the only provider in a remote rural area, or

(fn 16 continued)

> It is absolutely clear to me that...the patients at Town Court Nursing Home are better off there than they would be anywhere else in the foreseeable future. (128a)

and

> ...it is clear on the record that the continuation of patients in the nursing home during that period [of administrative review] would not be inconsistent with the continued health and welfare of the patients - in other words, none of the alleged complaints bear on any serious safety or health hazards...

whether decertification should be delayed for a short period until a nearby replacement facility under construction is ready, or whether an option such as court appointed receivership to replace deficient management is available to resolve the problem without harm to the patients or loss of a sound physical plant.[17]

17. New York Public Health Law §2810; Minnesota Statutes §144A.15; Wisconsin Laws of 1977, Ch 112; New Jersey Statutes Annotated 26:2H-36 et seq; Kansas Statutes Annotated 39-926, 39-931, 39-936; Connecticut Public Act No. 78-227; Resident v. Emmanuel Family Training Center, CCH Medicare & Medicaid Guide ¶29,098 (C.A. No. C78-477,N.D. Ohio, filed April 1978); Texas v. Forest Manor Nursing Home, No. 77-8555-H (District Court, Dallas County, Texas, 160th Judicial District, filed August,1977); Toler v. Lula Toler Convalescing Home, 364 S.W. 2d 680(Ark. 1963); Fields v. Berger, Index No. 42206/75 (N.Y.Sup. Ct.,N.Y. County, 1975); Van Ness v. Shore Manor, Ltd., No. C.3987-75 (N.J. Super. Ct., Atl. Cnty. 1976); Bellati v. Heritage Hill at Newton Residence & Convalescence Home, Inc., Civ. Action No. 78-4855 (N.J. Super. Ct., Middlesex Cnty., filed Sept. 14, 1978).

The entitlement of patient interests to a status of at least equality with the government's administrative interests flows from the very origins of the Medicaid program which mandates:

> such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients.

42 USC §1396a (a)(19). Indeed, the standards for nursing home operation, and enforcement of standards, have little meaning except insofar as they further "the best interests of the recipients."[18]

18. Consideration of best interests is incorporated into the regulatory criteria for determining whether a deficient facility should be decertified under Medicaid, which permit certification if the deficiencies "do not jeopardize the patient's health and safety nor seriously limit the facility's capacity to give adequate care" (42 CFR §442.105(a).

Petitioner and the Secretary of HEW err fundamentally when they speak of the patients' interests being indirect and derivative. (Pet. brief, pp.15, 18; HEW brief, p.31). Exactly the opposite is true. The purpose of the Medicaid program is to make medical assistance available to aged, blind and disabled individuals who are in need of assistance, 42 USC §1396,[19] and whatever interest a provider may have is derived from the recipients' interests.[20] The nursing home here derives its interest in obtaining Medicaid reimbursement from the fact that recipients reside there, not the other way around, in a manner which is comparable to the interests of a supermarket under the Food Stamp Program, 7 CFR §271 et seq., or of

19. Pennsylvania state law contains a similar statement of purpose and protection of recipient interests. 62 Purden Statutes §401.

(See fn. 20 on next page)

a landlord who receives direct payment of rent under Title IV of the Social Security Act (Aid to Families with Dependent Children), 45 CFR §234.60. Yet, while petitioner and the Secretary of HEW point out the limitations on the process due the facility (Pet. brief, pp. 5, 8, 18; HEW brief, pp. 38-39), it is implicitly recognized that the facility does have a protected property interest, whether under statute or regulation, or by contract (i.e. the provider agreement). Perry v. Sinderman, supra 408 U.S. at 601. Given the primacy of the patients' interests it is the height of irony that the business interests of nursing homes are assertedly entitled to greater constitutional protection than

20. It is in this respect that petitioner's and HEW's strained analogy to government contracts (e.g. "decision whether Lockheed's latest fighter is faster or a better buy") (Pet. brief, p. 18; HEW brief, p.24, 30) fails.

the direct, deep and overriding interests of the aged and disabled nursing home patients whom the program is intended to protect.

The patients residing at Town Court have a protectable property interest even if their interest is "only" indirect and derivative. "Property" interests recognized and enforceable under state law of contracts, although not incorporated in an explicit agreement, are nonetheless subject to procedural due process protection. Perry v. Sinderman, supra 408 U.S. at 601-602. Thus the fact that the patients are the intended primary beneficiaries of the Medicaid program in general[21] and the provider agreement in particular, gives them a right to assert whatever interest the facility has under

21. Although the Social Security Act provisions defining the State's duties under the federal-state assistance programs merely establish the conditions that a state must meet if it wants federal reimbursement, these conditions have long been held to be

(fn. 21 continued on next page)

the Pennsylvania law of contracts. Brill v. Brill, 282 Pa. 276, 127 A. 840 (1925); Commonwealth v. Great American Indemnity Co., 312 Pa. 183, 167 A. 793 (1933). This right as a "third party beneficiary" gives the patients a property interest which is constitutionally protected since, in each case, the existence of a property interest "hinges on a question of state law." Perry v. Sinderman, supra, 408 U.S. at 604 (Burger, Ch. J., concurring).

C. The Input of Patients into the Facility Termination Decision is Meaningful and Important.

Petitioner and HEW suggest that patients

(fn. 21 continued)

directly enforceable against states by the intended recipients as beneficiaries of the programs. King v. Smith, 392 U.S. 309 (1968).

are unable to provide meaningful and non-duplicative input into the facility termination decision, and that additional proceedings would undercut enforcement.[22] It is paternalistic and patronizing to suggest that nursing homes and government assistance bureaucracies are better judges of patients' "best interests" than the patients themselves. Nursing home patients are no more precluded from meaningful participation than are nursing home owners by lack of specialized medical or technical knowledge since experts, physicians, attorneys and other spokesmen are available to both. Throughout the country,

22. The assertion that patients' interests are too insubstantial to merit more than post-termination review is hardly worthy of response other than to note that, while the monetary interests of providers may be protected by post-termination proceedings, the injury to patients from transfer trauma is "irreparable in the true sense of the word." Burchette v. Dumpson, 387 F.Supp. 812, 819 (E.D.N.Y.1974).

nursing home patients assert their own interests clearly and effectively through their own organizations, State-sponsored "ombudsman" programs, advocates funded by HEW Administration on Aging, and Legal Services Corporation programs. See, e.g., Bracco v. Lachner, 462 F.Supp 436 (N.D. Cal. 1978) (patients represented by Public Advocates, Inc.); Yaretsky v. Blum, supra (patients represented by legal services programs); Klein v. Mathews 430 F. Supp. 1005 (N.J. 1977), aff'd 586 F.2d 250 (3d Cir. 1978) (patients represented by N.J. Dept. of Public Advocate). See also, brief of amici Jill Harris and Residents of Edgefield Manor (this includes patients in Philadelphia, where Town Court is located); DeGregorio v. Segal, supra (patients represented by Community Legal Services).

While patients can provide useful

input across the whole range of "decertification" issues, there are a variety of issues on which patients have a unique perspective and interests different from those of either the provider or the agency (see discussion pp. 55, supra). Perhaps the uniqueness of patient perspective, the variety of remedies available and the value of patient input are best illustrated by several nursing home "decertification" and transfer situations in which amici have been involved. In Fields v. Berger, No. 42206/75 (N.Y. Sup. Ct., N.Y.Co.), New York State authorities found a nursing facility in violation of population density standards and ordered discharge of 1/3 of the patients. HEW ordered a correction of structural violations, and the nursing home operator sought to minimize his financial loss by dumping patients. Intervention by patients represented by amicus Legal Services for the

Elderly Poor, led to agreement for phased reduction of population, takeover of facility by a non-profit receiver and ultimately by a community organization, and a workable plan for correction of structural violations. In Kane v. Perry, 88 Misc. 2d 1019 (S.Ct.,Orange Co.,1975), rev'd 55 A.D. 2d 678 (2d Dept. 1976), rev'd 41 N.Y.2d 1051 (1977), HEW ordered decertification of a small rural nursing home for structual deficiencies. The owner was relatively indifferent because Medicaid patients made up only a small portion of the total population. Patients asserted that deficiencies were counterbalanced by acknowledged exemplary care, the non-emergency nature of violations, anticipated approval of replacement facility, and evidence of transfer trauma. Although no new Medicaid patients were admitted, a hearing was ordered to weigh the competing risks for the current Medicaid

patients who were permitted to remain for several years until the matter was mooted when the owner retired and went out of business. In the case of Kings Harbor Nursing Home, both New York State authorities and HEW attempted to decertify and de-license the facility for inadequate care. The patients, represented by the Kings Harbor Organization of Relatives and amicus F.R.I.A., did not oppose these actions but, to avoid relocation, assisted the state in obtaining removal of the present management, imposition of the state as a temporary court-appointed receiver, and anticipated establishment of a new qualified operator. In Peterson v. Berger, 75 Civ. 2667 (S.D.N.Y.), New York and HEW ordered the decertification and closing of an unsafe nursing home. The owner sought to prevent the closing until just

before Christmas, at which time he began to precipitously discharge patients in order to close the facility quickly and minimize his financial losses. The patients, represented by amicus Legal Services for the Elderly Poor, did not oppose closing but obtained, through court intervention, an agreed plan to insure appropriate placement of patients and safe and orderly discharge.

The above examples illustrate that the nursing facility and the government agenct have interests of their own which do not necessarily parallel the legitimate interests of patients, and that neither the facility nor the agency is an adequate substitute for responsible presentation by patients of their own interests. They also illustrate that accommodating presentation of patient interests does not undercut the ability of the government to enforce standards

in nursing homes. The patients and amici have every interest in spirited and resolute enforcement of nursing home standards. However, it is no solution to punish patients for the sins of the facilities; the solution is more thoughtful enforcement and creative remedies.

Finally, the argument that a hearing for patients would cause intolerable delay (HEW brief, pp.38-39) and undermine the ability "to quickly and effectively terminate" providers (Pet. brief p. 23) are specious indeed in this case. The time needed to provide a hearing is minimal in relation to the leisurely pace with which HEW and Pennsylvania moved against Town Court (HEW brief, at pp. 6-10), and the requirements of due process are sufficiently flexible to cope with the need for prompt action when it is legitimately

required. Goss v. Lopez, 419 U.S. 565, (1975); compare Hathaway v. Mathews, 546 F.2d 227 (7th Cir. 1976) with Case v. Weinberger, 523 F.2d 602 (2d Cir. 1975).

CONCLUSION

For the reasons set forth above, amici respectfully urge that this Court dismiss the writ of certiorari in this case as improvidently granted or vacate the judgment below and remand the case for further proceedings; in the alternative, this Court should affirm the judgment of the Court of Appeals.

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August 10, 1979

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